DISTRIB
JAN 4

RECEIVED
JAN 4 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

Appellate Docket No. 73-7006

ORIGINAL COPY

JAMES P. LEE, JR. and
RONALD RICH,
Appellants

vs.

WILLIAM THORNTON,
District Director of
United States Customs
for the District
of Vermont;
VERNON D. ACREE,
United States Commissioner
of Customs;
WILLIAM E. SIMON,
United States Secretary
of the Treasury; and
THE UNITED STATES OF
AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO VACATE OR AFFIRM

J. MORRIS CLARK
University of Minnesota
Law School
125 Fraser Hall
Minneapolis, Minnesota 55455
(612)373-2851)
(Of Counsel)

JAMES R. PLETT
Office of Defender General
State Street
Montpelier, Vermont 05602
(802)828-3194)
(Of Counsel)

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

ORIGINAL COPY

JAMES P. LEE, JR. and
RONALD RICH,
Appellants

vs.

WILLIAM THORNTON,
District Director of
United States Customs
for the District
of Vermont;
VERNON D. ACREE,
United States Commissioner
of Customs;
WILLIAM E. SIMON,
United States Secretary
of the Treasury; and
THE UNITED STATES OF
AMERICA,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

BRIEF IN OPPOSITION TO MOTION TO VACATE OR AFFIRM

J. MORRIS CLARK
University of Minnesota
Law School
125 Fraser Hall
Minneapolis, Minnesota 55455
(612)373-2851)
(Of Counsel)

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
Burlington, Vermont 05401
(802)863-2871)
Attorneys for Appellant
James P. Lee, Jr.

JAMES R. FLETT
Office of Defender General
State Street
Montpelier, Vermont 05602
(802)828-3194)
(Of Counsel)

PETER F. LANGROCK
Langrock & Sperry
15 South Pleasant Street
Middlebury, Vermont 05753
(802)388-7979)
Attorney for Appellant
Ronald Rich

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-7006

JAMES P. LEE, JR. and RONALD RICH, Appellants

vs.

WILLIAM THORNTON, District Director of the United States Customs for the District of Vermont, et al., Appellees

---

On Appeal from the United States District Court

for the District of Vermont

Brief In Opposition To Motion To Vacate Or Affirm

Pursuant to Rule 16(d) of the Rules of the Supreme Court, Appellants submit this brief in opposition to Appellees' motion to vacate or affirm.

I. INTRODUCTION

Appellees have submitted a motion to vacate or affirm the judgment below alleging that the Court below erroneously predicated jurisdiction on 28 U.S.C. § 1346(a)(2)(The Tucker Act) and that no substantial issues warranting plenary consideration are before this Court. Because appellees have not appealed the judgment below and, therefore, the jurisdiction of the Court below was not treated in appellants' jurisdictional

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

WILLIAM THORNTON, District Director of the United States Customs for the District of Vermont, et al., Appellees

---

On Appeal from the United States District Court

for the District of Vermont

Brief In Opposition To Motion To Vacate Or Affirm

Pursuant to Rule 16(d) of the Rules of the Supreme Court, Appellants submit this brief in opposition to Appellees' motion to vacate or affirm.

I. INTRODUCTION

Appellees have submitted a motion to vacate or affirm the judgment below alleging that the Court below erroneously predicated jurisdiction on 28 U.S.C. § 1346(a)(2)(The Tucker Act) and that no substantial issues warranting plenary consideration are before this Court. Because appellees have not appealed the judgment below and, therefore, the jurisdiction of the Court below was not treated in appellants' jurisdictional statement, appellants submit this additional brief in response to appellees' motion.

II. APPELLEES' MOTION TO VACATE SHOULD BE DENIED

Appellants, James P. Lee and Ronald Rich, were both subjected to civil penalties pursuant to 19 U.S.C. § 1460 for allegedly crossing into the United States from Canada while operating a motor vehicle without reporting for inspection. The civil penalty assessed against appellant Rich was mitigated to $25.00 and paid. The civil penalty assessed against appellant James Lee was mitigated in full.

The vehicle operated by James P. Lee was also subjected to forfeiture pursuant to 19 U.S.C. § 1595(a) and 21 U.S.C. § 881 since it was allegedly carrying contraband. The vehicle was seized and finally returned after Appellant Lee filed a petition for mitigation and remission and paid the remitted penalty of $100.

Appellants brought an action in the United States District Court for the District of Vermont seeking damages, including the return of the penalties they had paid, and an injunction against enforcement of certain provisions of the United States Customs laws.[1/] Jurisdiction was predicated

---

1/ The complaint in Civ. No. 6451, Lee v. Thornton et al. requested that:

> "This court issue its writ in the nature of mandamus ordering defendants to restore to plaintiff the one hundred dollars ($100) penalty assessed against and paid by him.
>
> This court award to plaintiff the amount of Two Thousand Dollars ($2000) to compensate him for damages incurred by defendants' actions.
>
> This court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1460, 19 U.S.C. § 1595a, 21 U.S.C. § 881 which provide for seizures and forfeitures

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

to $25.00 and paid. The civil penalty assessed against appellant James Lee was mitigated in full.

The vehicle operated by James P. Lee was also subjected to forfeiture pursuant to 19 U.S.C. § 1595(a) and 21 U.S.C. § 881 since it was allegedly carrying contraband. The vehicle was seized and finally returned after Appellant Lee filed a petition for mitigation and remission and paid the remitted penalty of $100.

Appellants brought an action in the United States District Court for the District of Vermont seeking damages, including the return of the penalties they had paid, and an injunction against enforcement of certain provisions of the United States Customs laws.[1/] Jurisdiction was predicated

---

1/ The complaint in Civ. No. 6451, Lee v. Thornton et al. requested that:

> "This court issue its writ in the nature of mandamus ordering defendants to restore to plaintiff the one hundred dollars ($100) penalty assessed against and paid by him.
>
> This court award to plaintiff the amount of Two Thousand Dollars ($2000) to compensate him for damages incurred by defendants' actions.
>
> This court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1460, 19 U.S.C. § 1595a, 21 U.S.C. § 881 which provide for seizures and forfeitures without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement of said statutory provisions.
>
> This court issue its declaratory judgment holding that the provisions of 19 U.S.C. § 1618 which allow defendant Connelly, defendant Ambrose or defendant Thornton to assess forfeitures and penalties without affording constitutional safeguards to be unconstitutional and without force or effect, and enjoining the further enforcement

on 28 U.S.C. §§ 1331, 1337, 1346(a)(2), and 1361. Since, as part of their prayer for relief, appellants sought an injunction against the enforcement of an Act of Congress on constitutional grounds, a three-judge District Court was convened.

Jurisdiction over appellant's claim for damages is clearly given by the Tucker Act, 28 U.S.C. § 1346(a)(2). See United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); Bramble v. Kleindienst, 357 F. Supp. 1028 (D. Colo. 1973), aff'd sub nom., 498 F.2d 968 (10th Cir. 1974); Melendez v. Schultz, 356 F. Supp. 1205 (D. Mass. 1973); Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969).[2]

Equitable relief may be granted in a Tucker Act case incidental to a claim for money damages. See, e.g., Clay v. United States, 210 F.2d 686 (D.C. Cir. 1953); Blanc v. United States, 244 F.2d 708 (2d Cir. 1957). Additionally, under the broad principles of pendent jurisdiction enunciated by this Court, the request for injunctive relief made by appellants can be adjudicated pendent to the claim for damages. Cf. Hagans v. Lavine, 415 U.S. 528 (1974). This appears to be the common sense approach taken by a number of courts in similar cases. See Bramble v. Kleindienst, 357 F. Supp. 1028

1/ of said statute provision.

The compiaint requested a three-judge district court on the basis of the constitutional challenge asserted in the last two paragraphs of the prayer for relief.

The prayer for relief in Civ. No. 6762, Rich v. Thornton et al. was similar.

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

clearly given by the Tucker Act, 28 U.S.C. § 1346(a)(2). See United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972); Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); Bramble v. Kleindienst, 357 F. Supp. 1028 (D. Colo. 1973), aff'd sub nom., 498 F.2d 968 (10th Cir. 1974); Melendez v. Schultz, 356 F. Supp. 1205 (D. Mass. 1973); Jaekel v. United States, 304 F. Supp. 993, 997 (S.D.N.Y. 1969).[2/]

Equitable relief may be granted in a Tucker Act case incidental to a claim for money damages. See, e.g., Clay v. United States, 210 F.2d 686 (D.C. Cir. 1953); Blanc v. United States, 244 F.2d 708 (2d Cir. 1957). Additionally, under the broad principles of pendent jurisdiction enunciated by this Court, the request for injunctive relief made by appellants can be adjudicated pendent to the claim for damages. Cf. Hagans v. Lavine, 415 U.S. 528 (1974). This appears to be the common sense approach taken by a number of courts in similar cases. See Bramble v. Kleindienst, 357 F. Supp. 1028

1/ of said statute provision.

The complaint requested a three-judge district court on the basis of the constitutional challenge asserted in the last two paragraphs of the prayer for relief.

The prayer for relief in Civ. No. 6762, Rich v. Thornton et al. was similar.

2/ Appellees assert that they contested the jurisdiction of the District Court. Motion to Vacate or Affirm at 5 n. 6. In fact, their sole challenge to jurisdiction on 28 U.S.C. § 1346(a)(2) was based on the alleged failure of Appellants to exhaust administrative remedies. See Defendant's Supplemental Memorandum of Law at 3-4. (Record, Doc. No. 26, Lee v. Thornton et al - Civ. No. 6451). While this Court may vacate for obvious jurisdictional errors without argument, see Richardson v. Morris, 409 U.S. 464 (1973), appellees are in the anomalous position of asserting that an obvious jurisdictional defect is present even though they never raised the defect below.

(D. Colo. 1973), aff'd sub nom., 498 F.2d 968 (10th Cir. 1974); Melendez v. Shultz, 356 F. Supp. 1205 (D. Mass. 1973).[3/]

The precedent relied upon by appellees is inapplicable since the cases involved only requests for declaratory or injunctive relief. See Richardson v. Morris, 409 U.S. 464 (1973); United States v. King, 395 U.S. 1 (1969).

For these reasons, appellees' motion to vacate should be denied.[4/]

III. THE MOTION TO AFFIRM SHOULD BE DENIED

Appellees' have argued that the judgment below should be affirmed on three grounds: (1) having paid remitted and mitigated penalties, appellants may not challenge alternative procedures; (2) the cost bond requirement of 19 U.S.C. § 1608 is clearly valid; and (3) this Court has ruled in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) that the imposition of the burden of proof upon the claimant in forfeiture proceedings is constitutionally valid. Appellants believe that none of these grounds have merit and the motion to affirm should be denied.

Appellees postured their first argument below as attack on appellants' standing based on failure to exhaust administrative remedies.[5/] The three judge court rejected the argument:

3/ Even if jurisdiction can not be predicated on the Tucker Act, the lower court clearly had jurisdiction under 28 U.S.C. § 1337 (acts regulating commerce) and 28 U.S.C. § 1361 (mandamus).

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

For these reasons, appellees' motion to vacate should be denied.[4/]

III. THE MOTION TO AFFIRM SHOULD BE DENIED

Appellees' have argued that the judgment below should be affirmed on three grounds: (1) having paid remitted and mitigated penalties, appellants may not challenge alternative procedures; (2) the cost bond requirement of 19 U.S.C. § 1608 is clearly valid; and (3) this Court has ruled in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) that the imposition of the burden of proof upon the claimant in forfeiture proceedings is constitutionally valid. Appellants believe that none of these grounds have merit and the motion to affirm should be denied.

Appellees postured their first argument below as attack on appellants' standing based on failure to exhaust administrative remedies.[5/] The three judge court rejected the argument:

3/ Even if jurisdiction can not be predicated on the Tucker Act, the lower court clearly had jurisdiction under 28 U.S.C. § 1337 (acts regulating commerce) and 28 U.S.C. § 1361 (mandamus).

4/ As an additional ground for asserting that the three judge court was improperly convened, appellees have asserted that the constitutional claims before this Court and the three-judge court are insubstantial. The claims are clearly not frivolous or absolutely devoid of merit. Compare Hagans v. Lavine, 415 U.S. 528 (1974). Thus, this argument is relevant only to the motion to affirm.

5/ This argument properly applies only to Appellant James Lee, who could have obtained a hearing under 19 U.S.C. § 1608 if he were able to afford the substantial cost bond. Appellant Ronald Rich could not obtain a hearing under 19 U.S.C. § 1608 or any other provision since he was assessed only a personal penalty and his vehicle was not forfeited.

> It would serve no purpose to require plaintiffs to exhaust remedies "the alleged inadequacy and untimeliness of which are cornerstones ... "of their claims. [Melendez v. Shultz, 356 F. Supp. 1205, 1208 (D. Mass. 1973)]. Cf. Gibson v. Berryhill, 411 U.S. 564 (1973). See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 241-43 (1968) (Harlan J., concurring). We do not regard the payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

Lee v. Thornton, 370 F. Supp. 312, 317 (D. Vt. 1974). In essence, appellees are asking that appellants pursue a remedy that is wholly unavailable to them or to suffer loss of their motor vehicles while they pursue this action.

Appellees' second argument is based upon Colacicco v. United States, 143 F.2d 410 (2d Cir. 1944), a case involving a challenge to the bond requirement before this Court. In Colacicco, however, the plaintiff was financially able to post the required bond and the court noted:

> [W]e reserve the point whether a claimant, who makes out a prima facie case against the forfeiture, and is financially unable to post a bond, will be absolved from that necessity.

In this case, it has been stipulated that "[Lee] was unable to post a penal bond in the amount of $250.00 required to prevent a forfeiture sale". Ammended Stipulation at 5 (Record, Doc. No. 25, Lee v. Thornton - Civ. No. 6451). Appellants reitirate their position that, as applied to an indigent, the cost bond requirement is irrational. See Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Finally, appellees have argued that the constitutional validity of imposing the burden of proof on the claimant in forfeiture proceedings has been determined in Calero-

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

> v. Berryhill, 411 U.S. 564 (1973). See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 241-43 (1968) (Harlan J., concurring). We do not regard the payments of the respective fines as mooting the otherwise substantial constitutional claims asserted by plaintiffs. Cf. Ward v. Love County, 253 U.S. 17 (1920).

Lee v. Thornton, 370 F. Supp. 312, 317 (D. Vt. 1974). In essence, appellees are asking that appellants pursue a remedy that is wholly unavailable to them or to suffer loss of their motor vehicles while they pursue this action.

Appellees' second argument is based upon Colacicco v. United States, 143 F.2d 410 (2d Cir. 1944), a case involving a challenge to the bond requirement before this Court. In Colacicco, however, the plaintiff was financially able to post the required bond and the court noted:

> [W]e reserve the point whether a claimant, who makes out a prima facie case against the forfeiture, and is financially unable to post a bond, will be absolved from that necessity.

In this case, it has been stipulated that "[Lee] was unable to post a penal bond in the amount of $250.00 required to prevent a forfeiture sale". Ammended Stipulation at 5 (Record, Doc. No. 25, Lee v. Thornton - Civ. No. 6451). Appellants reitirate their position that, as applied to an indigent, the cost bond requirement is irrational. See Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Finally, appellees have argued that the constitutional validity of imposing the burden of proof on the claimant in forfeiture proceedings has been determined in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

That case involved two narrow issues - (1) whether due process of law required a hearing prior to seizure pursuant to a forfeiture statute and (2) whether the seizure of property of an innocent owner-bailor was a "taking" under the Fifth and Fourteenth Ammendments. Neither holding is dispositive of the issues raised in this case.

Appellant Lee challenges the availability and content of the post-seizure hearing afforded pursuant to 19 U.S.C. § 1608 et seq. Appellant Lee asserts that the grounds necessary for seizure were not present since he was proceeding to a border check point. While the opinion in Calero-Toledo may suggest that the innocent owner of a vehicle or vessel admittedly involved in a crime has the burden of showing diligence in preventing unlawful use, it does not suggest that a person denying involvement of the vessel or vehicle in an offense has the burden of showing total innocence. Further, Calero-Toledo deals only with the relative burdens in a court challenge on constitutional grounds and not with the relative burdens in a statutory (and constitutionally mandated) post-seizure hearing. Finally, the defense raised by the bailor in Calero-Toledo does not threaten the right against self-incrimination as a requirement that the appellants go forward would do in this case. Compare Iannelli v. Long, 333 F. Supp. 407 (W.D. Pa. 1971).

IV. CONCLUSION

Appellees' motion to vacate or, in the alternative, affirm should be denied and the case set for plenary

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

the Fifth and Fourteenth Ammendments. Neither holding is dispositive of the issues raised in this case.

Appellant Lee challenges the availability and content of the post-seizure hearing afforded pursuant to 19 U.S.C. § 1608 et seq. Appellant Lee asserts that the grounds necessary for seizure were not present since he was proceeding to a border check point. While the opinion in Calero-Toledo may suggest that the innocent owner of a vehicle or vessel admittedly involved in a crime has the burden of showing diligence in preventing unlawful use, it does not suggest that a person denying involvement of the vessel or vehicle in an offense has the burden of showing total innocence. Further, Calero-Toledo deals only with the relative burdens in a court challenge on constitutional grounds and not with the relative burdens in a statutory (and constitutionally mandated) post-seizure hearing. Finally, the defense raised by the bailor in Calero-Toledo does not threaten the right against self-incrimination as a requirement that the appellants go forward would do in this case. Compare Iannelli v. Long, 333 F. Supp. 407 (W.D. Pa. 1971).

IV. CONCLUSION

Appellees' motion to vacate or, in the alternative, affirm should be denied and the case set for plenary consideration.

Respectfully submitted,

Dated: Jan 2, 1975

JOHN A. DOOLEY, III
Vermont Legal Aid, Inc.
150 Cherry Street
P.O. Box 562
Burlington, Vermont 05401
Attorney for Appellant
James P. Lee, Jr.